Nos. 89-1433, 89-1434

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

UNITED STATES OF AMERICA,
Appellant,

v.

SHAWN D. EICHMAN, et al.

UNITED STATES OF AMERICA,
Appellant,

v.

MARK JOHN HAGGERTY, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

Amicus Brief of the National Association for the Advancement of Colored People in Support of the Appellees

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QUESTION PRESENTED

Whether the First Amendment prohibits the prosecution, under the provisions of the Flag Protection Act of 1989, of political protesters who burned a flag of the United States as part of a political demonstration?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE NAACP

The National Association for the Advancement of Colored People is a non-profit membership corporation chartered by the State of New York. Its principal aims and objectives are clearly set forth in its Articles of Incorporation as follows:

> Voluntarily to promote equality of rights and eradicate caste or erase prejudice among the citizens of the United States;
>
> to advance the interests of colored citizens;
>
> to secure for them impartial suffrage;
>
> and to increase their opportunities for securing justice in the courts, education of their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and to publish all acts bearing upon the subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation.

From the Battle of Bunker Hill in the Revolutionary War up through the founding of the NAACP, black Americans were willing to fight and die for the principles of freedom and democracy which make this country special, even though the rights they fought to defend were almost totally denied to them. In all wars, before and after the birth of the NAACP, black Americans defended the country, its soil and flag by force of arms and have given their lives for it. Despite the glaring inequalities that they have faced in these United States, most black Americans have loved this country and its flag, which has stood as a proud symbol of the potential for "one nation...with liberty and justice for all."

The First Amendment has been a primary instrument used by the NAACP as it

has struggled to make a reality of the rights that the flag symbolized for its constituents. After eighty-one years of exercising and defending the rights guaranteed by the First Amendment to speak out, assemble, picket, demonstrate, boycott, and petition the government, black Americans have obtained formal legal entitlement to all of the rights the flag has represented.[1]

The NAACP has over 500,000 members and over 2,000 branches in the United States and overseas. Representing a typical cross section of viewpoints, many of its members are appalled at the burning

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[1] As the 1990 NAACP National Convention theme "The Struggle Continues" denotes, the mere legal recognition of these rights has not meant that they are enjoyed by all of our citizens. Discrimination is still widespread in our society and the means that were used to obtain the formal rights must continue to be used to eliminate discrimination "root and branch."

of a U.S. flag as a means of protest. We proudly fly the flag in front of our national headquarters, have a special office of veterans affairs and honor those black Americans who have fought and died for the country. However, the NAACP recognizes that an individual U.S. flag is but a symbol of the important rights embodied in our Constitution, Bill of Rights, and their Amendments. It is an inanimate object that can be and is replaced regularly. On the other hand, the First Amendment comes as close as anything in our governmental legacy to being chiseled in stone. The NAACP, reflecting on the important role that the First Amendment has played in our struggle to try to create a society "where all [persons] are judged by the content of their character and not the color of their

skin," must take great interest in protecting the broad interpretation of First Amendment clauses which allow civil dissent. The potential overriding public consequences of these consolidated cases cause the NAACP to file this Amicus Curiae brief urging affirmance of the opinions of the two U.S. District Courts.

STATEMENT OF THE CASE

In its decision in Texas v. Johnson, 105 L Ed 2d 342, 109 S.Ct. 2533(1989), this Court held that the conviction, under a Texas statute, of political protestors for burning a flag during a demonstration, was violative of the First Amendment's freedom of speech clause. In response the United States Congress enacted The Flag Protection Act of 1989 which makes it illegal to burn the flag and attempts to

deny First Amendment protection to flag burning activities.

All parties to the case agree that the appellees in these consolidated cases were engaged in political protests when they set fire to several different copies of the United States flag. The parties also agree that the appellees' flag burning activity constitutes expressive conduct protected by the First Amendment.

SUMMARY OF ARGUMENT

Flag burning as a part of a political protest is, to many citizens, an offensive form of expression, but it is an expression of ideas and thus protected under the Free Speech Clause of the First Amendment to the United States Constitution. The Court should adhere to the doctrine announced in Johnson. While

the Flag Protection Act does not contain some of the defects the Court found in the Texas statute, it does not eliminate the fundamental flaw of being an unjustified restriction on the content of expressive conduct designed to convey important political messages. The flag is a highly visible and important symbol. Its destruction during political protest is a significant communication of the urgency and/or content of the message being espoused.

The fact that there may be a national consensus as to the great, and perhaps unique, value the flag has as a symbol of our nation and its underlying principles of freedom and democracy does not warrant abridging the scope of First Amendment protections. Many of the doctrines of the Constitution and its Amendments are

explicitly designed to protect minorities and minority viewpoints from the tyranny of the majority. Drawing lines around certain forms of expressive non-violent and or otherwise legal political protest limits the ability of the holders of minority viewpoints to dramatically express their idea to the public at large. Engaging in acts that are shocking to others and/or dramatic is a time-honored manner of demonstrating the urgency of a message. Having gotten the attention of public or governmental officials in this fashion, dissident minorities are often able to proceed with more civil and polite discourse. Similarly, methods of protest that at one point in history seem outrageous or threatening later become accepted as part of the political status quo.

A decision that declares one symbol of the nation as being above the First Amendment opens the door to other similar restrictions on future forms of protest that might be deemed offensive to the symbolic value of replicas of highly significant objects such as the Constitution, the Bill of Rights, the Statute of Liberty, and the Washington Monument. More importantly, the position advanced by the government invites the continued restriction of political speech due to notions of what is offensive to the majority of citizens. The degree to which unrestricted expression is a linchpin of our globally respected democratic institutions can not be underestimated. To erode that reality would be damaging not only to our citizens, but to the hopes of persons all over the world who are

struggling for the right to protest freely about conditions which they think need governmental redress.

ARGUMENT

I. THIS COURT'S DECISION IN TEXAS V. JOHNSON WAS CORRECT AND THE DISTRICT COURTS' APPLICATION OF IT IN DECLARING THESE PROSECUTIONS UNCONSTITUTIONAL WAS APPROPRIATE.

In Texas v. Johnson, supra., the Court used a three prong analysis to determine the applicability of the First Amendment to the act of burning the flag of this country as part of a political protest. The United States, by conceding that under the doctrines announced in Johnson that the acts of the appellees were expressive conduct and that regulation of those acts by the Flag Protection Act constitutes the suppression of free expression, agrees that the two District Courts in these cases were

correct in their analyses of the first two prongs of this test of First Amendment coverage. The two prosecutions are thus subject to strict scrutiny analysis. Therefore, unless the Court accepts the Government's invitation to revisit the Johnson decision, U.S. Brief, p.24, the only real issue in these cases is whether there is a compelling governmental interest in regulating this acknowledged suppression of expressive conduct significant enough to meet the strict scrutiny test. Texas v. Johnson, 105 L Ed 2d 342, 355, 357-358.

The United States argues that this case is different from Johnson in that the Congress and the President have announced that "the physical integrity of the flag of the United States, as the unique symbol of the nation, merits protection not

accorded other national emblems." U.S. Brief, pp. 27, 29. Therefore, such expressive conduct should not now be accorded full First Amendment protection. In fact, this idea is not new to the legal analysis and was fully considered by the majority in Spence v. Washington, 418 U.S. 405(1974), which conceptualized the importance as follows before proceeding with its analysis:

> [I]t might be argued that the interest asserted by the state court is based on the **uniquely universal character of the national flag as a symbol**. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and defend a Nation in which self-government and personal liberty endure....
>
> But we need not decide ...whether the interest advanced by the court below is valid. We **assume, arguendo, that it is.**

Spence, 418 U.S. at 413-414(emphasis added). Other passages from the First Amendment flag cases show that this Court has long acknowledged the essence of the statements about the flag's position in our culture made by Congress and the President in supporting the passage of the Flag Protection Act.

For example, in Johnson v. Texas, the majority recognized "the dissent's quite correct reminder of the unique position that the flag occupies in our society," 105 L Ed 2d at 361 n. 11, and also stated "it cannot be gainsaid that there is a special place for the flag in this Nation," 105 L Ed 2d at 362. Justice Kennedy, in his concurring opinion expressed the difficulty of recognizing that the First Amendment permitted destruction of an item of such an

important symbolic importance: "the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." 105 L Ed 2d at 365, (Kennedy, J., concurring).

Similarly, this notion was recognized by the district courts. The opinion in Haggerty stated:

> "[T]he court respects the strong feelings held by many on this issue. The court is well aware of the reverence with which many people who have sacrificed much for this country regard the United States flag."

United States v. Haggerty, 1990 U.S. District LEXIS 1652, p. 20. Therefore, the cases currently before the Court do not present any new question because all of the judges considering this issue understood the obvious significance of the flag in our society.

The Government claims the symbolic value of the flag is so great that the physical act of destroying the flag in the course of a political demonstration is "a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty." U.S. Brief, p. 36. However, the Government cites no evidence to support this assertion other than reference to a 1968 Congressional finding that such actions "inflict an injury on the entire Nation." U.S. Brief, p. 35-36 n. 28. This statement does not in any way establish an injury of the severity urged upon us by the Government nor does it evidence an injury to anything other than the symbolic role that the flag plays in our nation's

culture. Congress has failed to establish facts which show "that the flag [is] in grave and immediate danger of being stripped of its symbolic value." Johnson, 105 L Ed 2d at 351(citations omitted). Therefore, the analysis of the instant applications of the Flag Protection Act falls squarely within the guidelines of Johnson. Despite having fully acknowledged the importance of the flag as a cultural and political symbol, the Court has refused to treat speech concerning the flag any differently than other protected speech, noting that "[w]e decline to create an exception for the flag to the joust of principles protected by the First Amendment." Johnson, 105 L Ed 2d at p. 362.

Although the standards of analysis for Johnson and these cases would seem to

be identical, these cases do involve a Congressional enactment rather than a state law. While it is true that Congressional enactments are due deference, this Court has not exhibited any hesitancy in applying high First Amendment standards to cases arising over the enforcement of Congressional enactments. Landmark Communications, Inc. v. Virginia, 435 U.S. 829(1978). For example, in Watts v. United States, 394 U.S. 705(1969), this Court sided with the First Amendment when faced with the conflict of interpreting the statute which prohibited threats on the life of the President and the safeguards of the free speech clause. The court stated:

> "[W]e must interpret the language Congress chose `against the background of a profound commitment to the principle that debate on public issues should be uninhibited, robust and wide

> open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials....' The language of the political arena... is often vituperative, abusive, and inexact."

Watts, 394 U.S. at 708, (citations omitted). Clearly, words that on their face could be interpreted as a direct threat to the President of the United States were at least as great a threat to the society than the destruction of one or several copies of the flag.[2]

The United States argues that the restriction of expressive conduct imposed by the Flag Protection Act is not so harmful since dissidents such as the

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[2] Amicus recognizes that the Court did not invalidate a statute in Watts, but rather said that the protections of the First Amendment must be held "clearly in mind" when interpreting the statute and held that Watts' comments were thus outside the meaning of the statutory term "threat". Watts, 394 U.S. at 707-8.

appellees in this case have "suitable alternative means to express (and others to have means to receive) whatever protected expression may be a part of their intended message...." U.S. Brief, p. 33. This argument was rejected summarily in both Spence, 418 U.S. at 411 n. 4 and Johnson, 105 L Ed 2d at 361 n. 11. The United States is in essence contending that only by being able to prosecute every instance of the physical destruction of the flag, other than for the purpose of disposing of a soiled or damaged flag, will this country be able to accomplish the goal of the "preservation of the flag as the unique symbol of our Nation." U.S. Brief, p. 29 and n 24.

Amicus urges that the Court not be persuaded by these arguments about the diminishment of the value of a primary

national symbol at the expense of broad freedom of expression. Those advocating limitations on protected expressive conduct should remember all of the options available to them for advancing the notion that the flag is an important and revered symbol of this nation's legacy of freedom and democracy. More importantly, they should remember the more fundamental ideas that the flag represents - freedom, liberty, equality and justice. The promotion of these ideas is even more important than the promotion of a symbol. The last paragraph of Section IV of the majority opinion in Johnson eloquently explains this point and concludes by reminding us all that, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the

freedom that this cherished symbol represents." Johnson, 105 L Ed at 363-4.

II. THE HISTORY OF THE FIRST AMENDMENT IN PROTECTING THE RIGHTS OF MINORITIES TO ENGAGE IN PROTESTS DESIGNED TO ACHIEVE RACIAL EQUALITY DEMONSTRATES WHY GREAT CAUTION SHOULD BE GIVEN TO ANY CONSIDERATION OF NARROWING ITS SCOPE.

The manner in which this Court has addressed First Amendment issues growing out of the struggle for equality of rights for black Americans and other minorities suggests considerations which might serve as a model for analysis of the expressive conduct now before the Court.

Before reviewing some of the contributions of the First Amendment to the struggle for equal rights, it must be pointed out that the NAACP recognizes that the First Amendment condones speech that we do not approve and in fact much that we

find abhorrent and highly offensive to our constituents. The Johnson decision reminds us of this when the Court declares:

> The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole - such as the principle that discrimination on the basis of race is odious and destructive - will go unquestioned in the marketplace of ideas."

Texas v. Johnson, 105 L Ed 2d at 362.

Despite the fact that the NAACP sometimes pushes the law as far as it will go in restricting speech that is racially offensive, we adhere to the general principle that the protections of the First Amendment for political protestors must be broad. Political protestors must

be free to make their statements in dramatic ways.[3]

The cases before the Court squarely represent an attempt by Congress and the President to prescribe what shall be orthodox in nationalism and patriotism. Johnson, 105 L Ed 2d at 361-362. The NAACP's members, supporters, and constituents have long struggled for equality of rights by expressing ideas in matters of politics and public policy which at the time were unorthodox. More importantly, this expression of politically charged ideas has often been by means which at the time were considered

[3] Of course, there are limitations on free speech and other rulings of this Court have set forth those quite clearly. Acknowledgement of these limitations does not by any means require that one reach the conclusion advocated by the government in this case, as they were also distinguished in Johnson, 105 L Ed 2d at 356-357.

unacceptable and perhaps even threatening to the fabric of society.[4]

Civil rights protesters in the 1960's were constantly arrested on a wide variety of charges because their behavior was considered to be a threat to the status quo. Similarly, public officials tried to intimidate or interfere with the operation of civil rights groups such as the NAACP as a means of defeating the struggle for racial equality. This Court relied upon free speech and other First Amendment grounds to reject most of these practices.[5]

[4] See the dissent of Justice Black in Brown v. Louisiana, 383 U.S. 131(1966) where he feared mob rule if totally peaceful sit-ins were allowed to continue without criminal prosecution.

[5] These are some of the pivotal civil rights case which concretized the rights of black Americans to aggressively seek racial equality. Gibson v. Florida Legislative Committee, 372 U.S. 539(1963) (government must show an immediate, substantial and subordinating interest which is

(continued...)

When reflecting on the sit-in, demonstration, litigation, and boycott cases from the civil rights movement, it

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[5](...continued)
compelling to justify impinging on First Amendment right of association in civil rights organizations); NAACP v. Claiborne Hardware Co., 458 U.S. 886(1982) (imposition of civil liability against civil rights organization and its members for losses suffered during a boycott merely because of their association violates First Amendment rights of free speech and association); NAACP v. Button, 371 U.S. 415(1963) (upheld ability of civil rights groups to provide legal services as "mode of expression and association protected by the First and Fourteenth Amendments"); Bates v. Little Rock, 361 U.S. 516(1960) (reversed convictions of local NAACP officials for refusing to produce membership list as violative of freedom of speech, assembly, and association); Shuttlesworth v. Birmingham, 394 U.S. 137(1969) (reversed conviction for demonstrating without permit where overly broad ordinance impinged upon First Amendment rights); Brown v. Louisiana, 383 U.S. 131(1966) (recognized expressive nature of sit-in demonstration by black students in segregated public library); Gregory v. Chicago, 394 U.S. 111(1969) (overturned civil rights demonstrators' disorderly conduct convictions stemming from nonviolent marching which provoked hecklers to assaults with rocks and eggs); Talley v. California, 362 U.S. 60(1960) (invalidated ordinance which prohibited anonymous pamphlets and handbills protesting denial of equal employment opportunities).

is also important to note how far we have come in accepting the right of persons to protest. From the perspective of 1990, it is sometimes hard to believe that people were arrested for such orderly and peaceful behavior in attempts to obtain the body of rights that the Johnson majority called a "virtually sacred" part of our nation's system of values.[6]

Wide ranging forms of non-violent expressive conduct have not led to mobs ruled by hate, passion or greed, no more so than wearing of the flag on a pair of

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[6] For example, compare Justice Black's dissent in Brown and his majority opinion in Adderly v. Florida, 385 U.S. 39(1966) to see the frailty of the protection given to First Amendment activities in the mid-1960's. Given the rulings of the Court in the years since Adderly, it is hard to imagine that such peaceful and orderly behavior would even result in an arrest in many places today, let alone give rise to a Supreme Court decision denying First Amendment protection to the demonstrators.

jeans or the refusal to salute the flag. Despite the oft-stated fears that granting wide range to the forms of expressive conduct would lead to social disorganization, it has,to the contrary, contributed to the uninhibited, robust and wide-open debate of public issues, albeit sometimes with vehement, caustic and unpleasantly sharp attacks on governmental officials and/or political opponents. Just as the predictions of social ruin which accompanied past attempts to limit free political expression have failed to materialize, the burning of the flag as part of political protest will not destroy the fabric of our democratic institutions and the moral core of our society.

While it is difficult to imagine that the NAACP would ever organize a demonstration that would include the

burning of a U.S. flag, we are not willing to see encroachments on the right for wide-ranging political protests which include expressive conduct. As was noted in Justice Douglas' dissent in Adderly v. Florida, 385 U.S. at pp. 50-51:

> Conventional methods of petitioning may be, and often have been shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable.

Our constituents and similar groups representing less powerful persons often find themselves in such a position and are

dependent on the First Amendment to allow them to draw attention to their cause. * speech more effective with than without

Amicus would hope that with the passage of time, all Americans now can understand Street's expressive conduct upon hearing the news that civil rights activist James Meredith had been shot by a sniper who was hidden on the side of a Mississippi road on which Mr. Meredith was walking in a solitary march against fear. Meredith and many others risked their lives to help institute just governments at all levels of society which would secure the inalienable rights of life, liberty and the pursuit of happiness for black Americans a century after the Civil War. While the legal status of black Americans has changed dramatically since the time when Mr. Meredith was shot and

Mr. Street burned and criticized the U.S. flag, we cannot comfortably sit back and say that circumstances no longer exist which will drive someone else to make such a reaction to instances of racism in the United States.' Who is to say what responses might occur from acts equivalent to recent occurrences as the killings and racial violence in Bensonhurst and Howard Beach or the bombings and attempted

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' Street v. New York, 394 U.S. 576(1969). Mr. Street burned and verbally insulted one of his U.S. flags after hearing that civil rights leader James Meredith had been shot. He was convicted for his affronts to the flag. The conviction was overturned on First Amendment grounds. The flag that Mr. Street burned had been neatly folded in a drawer and previously was used for display on national holidays. This is not the profile of a person who has contempt for the flag. Many of the decisions of the Courts and much of the United States' argument assume that the only person who would burn a flag is one who holds it and the country in great disregard. It is not unlikely that some who love their country and its values could burn the flag to express their outrage over certain political or social circumstances.

bombings of federal judges and NAACP offices and cooperating attorneys in the South.

There has been a tendency of many in our society at all phases of history to assume that we have attained a satisfactory level of freedom and justice and to therefore denounce as unpatriotic and subversive those who point to flaws in our society. While all of the reforms advocated by so called extremists are not eventually adopted by the political mainstream, many changes become accepted as part of the political status quo. For example, the Court in Johnson could point to the virtual sacredness of the concept of racial equality only 35 years after a controversial decision that declared institutional de jure segregation to be

unconstitutional.[8] We must keep the doors open so that our society can continue to grow and maintain its reputation as a world leader in championing individual rights.

We must not forget what the Court so accurately recognized in Johnson, and continue to zealously guard our grand tradition of freedom of expression:

> "To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible boundaries....[H]ow would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences and impose them on the citizenry, in the very way

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[8] See Johnson, 105 L Ed 2d 362. Brown v. Topeka Board of Education, 347 U.S. 483 (1954). However, as the recent rulings in the Yonkers and St. Louis school cases demonstrate, the struggle for equal rights is still being strongly resisted and is requiring extensive litigation.

> that the First Amendment forbids."

Johnson, 105 L Ed 2d at 362. The protections of the First Amendment are too precious and essential to our notion of a free society to entrust to the changing tides of political fancy that often sweep our country.

CONCLUSION

The reaction of distaste which many feel when hearing that a copy of the U.S. flag has been burned is not unlike the reaction which the Court has recognized is inherent in the life of a country which embraces democratic ideals as fully as has ours. This Court's precedents recognize:

> [that a] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Texas v. Johnson, 105 L Ed 2d at 356 (citations omitted).

Because the NAACP so dearly appreciates the social progress it has been able to promote through exercise of the First Amendment and because it anticipates using First Amendment protections extensively in the future as it strives to complete the unfinished agenda of the civil rights revolution, we urge this Court to once again, as in Johnson, "make a decision we do not like" and to make it because it is "right in the sense that the law and the Constitution ...compel the result. Johnson, 105 L Ed 2d at 364(Kennedy, J., concurring).

Our organization and its constituents are not the only ones who appreciate the values represented by the U.S. flag. As Judge Rothstein so ably reminded us,

> Countries all over the world are striving to adopt democratic principles derived from our Constitution as part of their forms of government. The freedom of speech enshrined on our First Amendment is the crucial foundation without which other democratic values cannot flourish. It is a tribute to the strength of our nation and to our faith in democratic government that even a means of protest which is profoundly painful and offensive to many people is protected.

United States v. Haggerty, 1990 U.S. District LEXIS 1652, pp. 20-21. Judge Rothstein also rejects the alarmist predictions of social ruin and places this issue in the proper perspective:

> Burning the flag...does not jeopardize the freedom which we hold dear. What would threaten our liberty is allowing the government to encroach on our right to political protest. It is with the firm belief that this decision strengthens what our flag stands for that this court finds the Flag Protection Act unconstitutional as applied to defendants conduct....

Haggerty, 1990 U.S. District LEXIS 1652, at p. 21.

For the foregoing reasons, the NAACP urges the Court to follow the doctrinal trend it has established in its prior First Amendment free speech cases involving the flag and affirm these rulings declaring the Flag Protection Act unconstitutional as applied to the appellees.

Respectfully submitted,

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